

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

MARVIN WAYNE VALDEZ

Claimant

VS.

T-N-T PILOT CAR

Uninsured Respondent

AND

WORKERS COMPENSATION FUND

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Docket No. 1,027,666

ORDER

Respondent and the Workers Compensation Fund request review of the April 11, 2006 preliminary hearing Order entered by Administrative Law Judge John D. Clark.

ISSUES

The Administrative Law Judge (ALJ) found the respondent had sufficient payroll to bring the parties under the Kansas Workers Compensation Act (Act) and further found the claimant's accidental injury arose out of and in the course of employment with the respondent. The ALJ designated a treating physician, ordered payment of temporary total disability compensation and assessed payment of benefits to the Workers Compensation Fund (Fund).

The Fund requested review of whether the respondent had sufficient payroll to bring the parties under the Act; whether the ALJ exceeded his jurisdiction ordering payment of temporary total disability compensation; and, whether the ALJ erred in ordering the Fund to pay benefits.

The respondent requested review of whether the Board has jurisdiction; whether respondent has sufficient payroll to be covered by the Act; whether the ALJ exceeded his authority ordering temporary total disability benefits; and, whether the claimant is entitled to temporary total disability compensation and medical benefits.

Claimant argues the ALJ's Order should be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Board makes the following findings of fact and conclusions of law:

Claimant was employed as a pilot car driver for respondent in 2004. He also performed occasional yard work, fencing, house repairs, and vehicle maintenance for the respondent. He would drive a lead vehicle warning traffic of the oncoming oversized loads. Claimant testified he was paid in cash after he completed each trip.

Between July 2005 and February 9, 2006, the claimant had not worked for the respondent. On February 9, 2006, the claimant was driving a pilot car to Louisiana for respondent when he crossed the center line and collided head on with an oncoming vehicle. He suffered injuries to his left upper extremity, ribs and knee. The claimant has not worked since the accident.

The claimant testified he was instructed on which route to drive and when or where he could stop. He initially testified that he had no idea how much money he was paid in 2005. He testified:

Q. Give the court an idea of how much money you paid from T-N-T, how much you were paid by T-N-T Pilot Car in 2005?

A. I couldn't never say. Quite a bit, quite a bit though.

Q. I need your best estimate.

A. I really couldn't give an estimate. I never really tried to keep track. I had a log book and stuff like that of my runs and this and that, but I don't know what happened to it.¹

Claimant later disputed the respondent's payroll listing which indicated he earned \$2,924 and he testified he earned at least \$10,000 in 2005 but he doesn't have anything to substantiate these wages.

Theresa Jackson, respondent's co-owner, testified that the business did not have a \$20,000 payroll in 2004, 2005 nor does it expect to have a \$20,000 payroll in 2006. Respondent's Schedule C, Profit or Loss from Business for 2005 indicated \$15,451 in wages paid and an additional \$1,031 in miscellaneous contract labor for a total of

¹ P. H. Trans., at 14.

\$16,482.² This included \$2,444³ in wages paid a child of the respondent's owners. An additional \$4,187⁴ was paid to individuals to cover trips that respondent was unable to perform. These individuals provided affidavits that indicated they received full payment and respondent did not receive any commission for those trips. However, even if considered employees, after subtracting the amount paid their child the payroll still would not exceed \$20,000. Finally, Ms. Jackson prepared an exhibit which listed the trips claimant had taken for respondent in 2005 which indicated claimant had been paid \$2,926.50.⁵ Another exhibit prepared by Ms. Jackson indicated claimant had been paid \$2,924.⁶

Jayna DeWitt, who also is employed by respondent as a pilot car driver, testified that she made \$8,195 in 2005. And she further testified that she drove much more than claimant in 2005. As previously noted, claimant did not work for respondent after July 2005 until he returned to take the ill fated trip on February 9, 2006 whereas Ms. DeWitt worked the entire year in 2005.

Initially, the Fund contends that the parties are not covered by the Act because respondent did not have a payroll of \$20,000.

It is the claimant's burden of proof to establish his right to an award of compensation and to prove those conditions on which the claimant's right depends.⁷ Claimant's burden to prove coverage under the Act, also includes whether respondent has the requisite payroll requirements as set forth in K.S.A. 44-505(a).⁸ The pertinent provisions of K.S.A. 44-505(a) provide as follows:

... the workers compensation act shall apply to all employments wherein employers employ employees within this state except . . .

(2) any employment, . . . wherein the employer had a total gross annual payroll for the preceding calendar year of not more than \$20,000 for all employees and wherein the employer reasonably estimates that such employer will not have a total

² *Id.*, Resp. Ex. 1.

³ *Id.*, Resp. Ex. 2.

⁴ *Id.*, Resp. Ex. 1.

⁵ *Id.*, Resp. Ex. 16.

⁶ *Id.*, Resp. Ex. 2.

⁷ *Hughes v. Inland Container Corp.*, 247 Kan. 407, 799 P.2d 1011 (1990).

⁸ *Brooks v. Lochner Builders, Inc.*, 5 Kan. App. 2d 152, 613 P.2d 389 (1980).

gross annual payroll for the current calendar year of more than \$20,000 for all employees, except that no wages paid to an employee who is a member of the employer's family by marriage or consanguinity shall be included as part of the total gross annual payroll of such employer for purposes of this subsection;

Simply stated, if claimant made at least \$10,000 in 2005 as he alleged, then respondent's payroll would exceed \$20,000 and the parties would be covered by the Act. However, the evidentiary record does not support his allegation regarding his wages. The respondent's exhibits demonstrate an insufficient payroll and a co-worker who worked the entire year with many more trips made less than claimant alleged he made while working only a few months.

Based upon the evidence compiled to date, claimant has failed to meet his burden of proof that respondent had the requisite payroll for the Act to apply.

Because the Act does not apply to the parties herein, all other issues raised by the respondent and Fund are rendered moot and will not be addressed.

As provided by the Act, preliminary hearing findings are not binding but subject to modification upon a full hearing on the claim.⁹

WHEREFORE, it is the finding of the Board that the Order of Administrative Law Judge John D. Clark dated April 11, 2006, is reversed.

IT IS SO ORDERED.

Dated this 30th day of June 2006.

BOARD MEMBER

c: Scott J. Mann, Attorney for Claimant
Orvel Mason, Attorney for Respondent
Matthew J. Schaefer, Attorney for Fund
John D. Clark, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director

⁹ K.S.A. 44-534a(a)(2).